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# SIXTH REPORT ON STATE RESPONSIBILITY

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Addendum

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## II. PRE-COUNTERMEASURES DISPUTE SETTLEMENT PROVISIONS SO FAR ENVISAGED FOR THE DRAFT ON STATE RESPONSIBILITY: A REAPPRAISAL

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### D. Proposals of the Special Rapporteur concerning articles 11 and 12 of Part Two of the draft articles

#### Article 11

1. Subject to the provisions of articles 12-14 [the following articles], the injured State whose demands under articles 6-10 bis have not met with an adequate response from the State which committed the internationally wrongful act is entitled not to comply with one or more of its obligations towards that State as necessary to induce it to comply with its obligations [under articles 6 to 10 bis].

2. An adequate response may either: (a) remove the basis for any reasonable belief by the victim State that an internationally wrongful act has been committed by the State against which the countermeasures are envisaged; or (b) offer a means of resolving the dispute within a reasonable time. However, a response does not become [shall not be deemed] inadequate merely because it fails to meet all the demands of the injured State [in particular demands for reparation] [forthwith].

3. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

#### Presentation

One of the main changes introduced by the 1993 Drafting Committee in draft article 11 as proposed by the Special Rapporteur in 1992 has been the elimination of the concept of "adequate response", which figured prominently in that draft. According to the Drafting Committee's formulation, the allegedly injured State's faculté to resort to countermeasures would continue "as long as" the alleged lawbreaker "has not complied with its obligations" of cessation or reparation. Countermeasures, and not just interim measures, would seem thus to be admissible even where the alleged lawbreaker responded in a positive way, albeit not yet finally or completely, to the allegedly injured State's protests or demands.

First, with regard to cessation, the Drafting Committee's phrase implies that an injured State may resort to countermeasures as from the very moment that it believes, rightly or wrongly, that a continuing wrongful act is being committed by the allegedly wrongdoing State, without any opportunity being given to the wrongdoer to explain, for example, that there is no wrongful act or that the wrongful act is not attributable to it. The notion of an "adequate response" would provide more of an opportunity for dialogue.

Secondly, with regard to reparation, the "failure to comply" condition seems to mean that countermeasures would be allowed to continue until the

wrongful State had made full reparation for the injury resulting from the wrongful act. Unless the wrongdoing State is capable of instantaneously providing full and complete reparation, which would most likely be exceptional, it might continue to be a target of countermeasures even after full admission of liability and even while in the process of providing reparation and/or satisfaction.

It is submitted that this provision could be usefully reconsidered in the Drafting Committee at the coming session.

Article 12

1. [Except as provided in the following paragraph], the injured State shall not resort to [counter]measures prior to:

(a) complying [in good faith] with its international obligations relating to the [negotiated or third party] settlement of international disputes;

(b) appropriate and timely communication of its intention to the law-breaking State.

2. The restrictions set forth in the preceding paragraph do not apply:

(a) to urgent interim [provisional] measures that the injured State may take in order to protect its rights infringed by the internationally wrongful act [breach] or limit [reduce] the damage deriving therefrom;

(b) where the law-breaking State does not cooperate in good faith in the negotiation or third party procedure proposed by the injured State in compliance with paragraph 1 (a) of the present article.

3. The right [faculté] of the injured State to take measures is suspended as soon as a [binding] third party dispute settlement procedure has been initiated and power to order interim measures of protection is vested in that party.

Presentation

Paragraph 1 (a): As compared with paragraph 1 (a) of the original (1992) proposal this provision reduces drastically - and to a bare minimum - the injured State's onus of prior amicable settlement. In particular:

(a) it leaves out:

(i) "exhausting"

(ii) "all"

and (iii) the references to "general international law" and the "United Nations Charter";

in addition:

(b) by merely referring to compliance with the injured State's (existing) dispute settlement obligations, it leaves the concrete solution of the temporal question to the interpretation of such obligations, obviously to be made case by case on the basis of the relevant dispute settlement instruments in force between the parties;

(c) leaves some room for future developments of the international law of dispute settlement by encouraging States (contrary to what a text that did not mention the priority question would do) to try to resolve that question in their future mutual dispute settlement agreements;

(d) expressly refers to negotiation (as advocated by a number of members also in the 1993 DC) as a basic dispute settlement procedure in addition to third party means.

Paragraph 1 (b): Simply reintroduces the "prior communication" requirement left out as a result of an oversight by last year's Drafting Committee.

Paragraph 2: Exempts the injured State from the requirements of both prior dispute settlement measures and prior communication whenever:

(i) it is a matter of "interim measures of protection" (a broad concept that should reduce considerably the restriction of the injured State's freedom of choice);

(ii) the law-breaking State does not cooperate in good faith in dispute settlement.

In either case the injured State's faculté to resort to countermeasures would remain practically unhampered, even the onus of prior communication falling.

It must be stressed that the concept of interim measures of protection is a rather broad one. It encompasses such measures as the freezing or seizure of assets, the imposition of a ban on export of given goods et similia. There is thus sufficient room for the injured State to protect its rights from jeopardy until the matter is settled by negotiation or third party procedure.

The concern that the discretionary power thus left to the injured State with regard to interim measures would nullify the obligations set forth in paragraph 1 appears to be unjustified because the concept of interim measures cannot be stretched beyond reasonable limits and unreasonable interim measures could be condemned by the third Party in any eventual dispute settlement procedure [and reparation ordered]. Some protection would thus be provided also for the law-breaking State. Obviously, better a small progress (towards more civilized practices) than no progress at all.

It is of course not suggested that, as is the case before the International Court of Justice, interim measures should not be available where damages would be a sufficient remedy.

Paragraph 3: In conformity with the 1993 Drafting Committee text, this provision suspends the injured State's faculté to resort to countermeasures as soon as a [binding] third party settlement procedure is initiated. Thus, that faculté would not even be suspended, for instance (unless agreed), in the course of negotiation.

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